Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN F. LONERGAN,
Petitioner

v.

THE UNITED STATES OF AMERICA

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that under 18 U.S.C. § 1546, an advance parole document is a "document prescribed by statute or regulation for entry...into the United States."

2. Whether the Court of Appeals erred in concluding that aliens paroled into the United States have "entered" the United States, as a matter of law.

PARTIES TO THE PROCEEDING

The caption of the case includes the names of all parties.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

INDEX TO APPENDIX iv

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 10

I. An Important Federal Question Is At Issue 11

II. The Third Circuit Answered The Question Whether Advance Parole Documents Are "Documents Prescribed By Statute or Regulation For Entry," When It Admitted That "No Statute Or Regulation Indicates Whether Advance Parole Documents Are Entry Documents," And Then Departed So Far From This Legal Finding So As To Require An Exercise Of This Court's Supervisory Power 13

A. In Its Analysis of 18 § U.S.C. 1546, The Third Expressly Acknowledged That There There Is No Statute Or Regulation Which Indicates That Advance Parole Docments Are Entry Documents. 13

B. The Third Circuit Disregarded the Language And Text of 18 U.S.C. § 1546, And In Lieu Thereof, Concocted And Imposed Its Own Language, Text, And Construction Of The Statute And Issue, Which Was A Violation Of This Court's Precedents And An Egregious Abuse Of Discretion. 14

C. The Third Circuit Erroneously Disregarded The Language And Text of 18 U.S.C. § 1546, In Order To Render A Decision Based On Its Misleading Interpretation Of Language Appearing On A Single Document, Which Which Was A Violation Of This Court's Precedents And An Egregious Abuse Of Discretion..... 16

III. The Third Circuit Misstated The Legislative History Concerning 8 U.S.C. § 1546 And A Fifth Circuit Decision Concerning The Statutory Proscription Of Section 1546..... 18

IV. The Third Circuit's Decision Conflicts With Statutory Law And Precedent Decisions Which Hold That Parole Does Not Constitute Nor Effect An Entry..... 20

CONCLUSION..... 30

APPENDIX

INDEX TO APPENDIX

COURT OF APPEALS
UNPUBLISHED OPINION I

COURT OF APPEALS JUDGMENT IX

COURT OF APPEALS ORDER -
DENIAL OF PETITION FOR REHEARING X

DISTRICT COURT ORDER –
DENIAL OF MOTIONS FOR JUDGMENT
OF ACQUITTAL AND A NEW TRIAL XII

8 U.S.C. § 1101(a)(13) (1964) XIV

8 U.S.C. § 1101(a)(13) (as amended Sept. 30 1996) XIV

8 U.S.C. § 1182(d)(5) XV

8 U.S.C. § 1324(a) XVI

18 U.S.C. § 1546 XVII

TABLE OF AUTHORITES

CASES

Federal Communications Comm'n v.
American Broadcasting Co.,
347 U.S. 284 (1954) 15

Jean v. Nelson,
727 F.2d 957 (9th Cir. 1984) 22

Kaplan v. Tod,
45 S.Ct 257 (1925)..... 22

Keppel v. Tiffin Savings Bank,
197 U.S. 356 (1904)..... 15

Leng May Ma v. Barber,
357 U.S. 185 (1958)..... 22

Market Co. v. Hoffman,
101 U.S. 112..... 15, 18

Shaughnessy v. United States ex rel.
Mezei, 73 S.Ct. 625(1953)..... 22

Siu Fung Luk v. Rosenberg,
409 F.2d 555 (9th Cir. 1969)..... 18, 22

United States v. Aguilar,
883 F.2d 662 (9th Cir. 1989)..... 28

United States v. Campos-Serrano,
404 U.S. 293 (1971)..... 11, 12, 15, 18

United States v. Cardenas-Alvarez,
987 F.2d 1129 (5th Cir. 1993)..... 28

United States v. Hanna,
639 F.2d 194 (5th Cir. 1981)..... 24, 25, 28, 29

United States v. Ju Toy,
25 S.Ct 644 (1905)..... 22

United States v. Kavazanjian,
623 F.2d 730 (1st Cir.1980)..... 23, 24, 27

United States v. Osiemi,
980 F.2d 344 (5th Cir. 1993)..... 11, 12, 19, 20

United States v. Oscar,
496 F.2d 492 (9th Cir. 1974)..... 28

United States v. Pierre,
688 F.2d 724 (11th Cir. 1982)..... 24, 25, 29

United States v. Universal C. I .T. Credit
Corp., 344 U.S. 218 (1952)..... 15

United States v. Vasilatos,
209 F.2d 195 (3rd Cir. 1954)..... 27

United States v. Zayas-Morales,
685 F.2d 1272 (11th Cir. 1982)..... 28, 29

Yang v. Maugans,
68 F.3d 1540 (3rd Cir. 1995)..... 21

STATUTES

8 U.S.C. § 1101(a)(13) (1964)..... 21

8 U.S.C. § 1101(a)(13) (as amended Sept. 30 1996).... 23

8 U.S.C. § 1182(d)(5)(A)..... 22

8 U.S.C. § 1324(a)(1)(A)(iv)..... 6

18 U.S.C. § 1546..... 6, 9, 13

MISCELLANEOUS

H.R. Rep. No. 104-569(I) (1996), WL 168955..... 27

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

Petitioner John F. Lonergan respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is unpublished and is reprinted in the Appendix hereto.

JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit was entered on November 16, 1998.

A timely petition for Rehearing and Rehearing en Banc was denied by the Third Circuit on April 13, 1999. The order is reprinted in the Appendix hereto.

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case concerns 8 U.S.C. § 1101(a)(13), 8 U.S.C. § 1182(d)(5)(A), 8 U.S.C. § 1324 and 18 U.S.C. § 1546.

STATEMENT OF THE CASE

A. The Indictment

On July 31, 1996, the prosecution filed a six-count indictment charging Petitioner John F. Lonergan – the former assistant director for examinations for the United States Immigration and Naturalization Service ("INS") in the District of New Jersey – with (1) aiding and abetting two aliens' fraudulent procurement and misuse of INS entry documents in violation of 18 U.S.C. §§ 1546 and 2 ("the Entry Document Count"), (2) aiding and abetting two aliens' illegal entry into the United States in violation of 8 U.S.C. § 1324(a)(1)(A)(iv) and 2 ("the Entry Count"), (3) conspiring to commit various offenses against the United States and to defraud the INS in violation of 18 U.S.C. § 371 ("the Conspiracy Count"), (4) accepting bribes in violation of 18 U.S.C. § 201(b)(2) ("the Bribery Count"), (5) accepting illegal gratuities in violation of 18 U.S.C. § 201(c)(1)(B) ("the Gratuity Count"), and (6) making false statements to federal agents in violation of 18 U.S.C. § 1001 ("the False Statement Count").

B. Statement of Facts

On November 19, 1996, following a 15-day trial, a jury convicted Petitioner under the Entry Document Count, the Entry Count, the Conspiracy Count, the Bribery Count, and the False Statement Count. The jury acquitted him under the Gratuity Count despite the fact that it is a lesser included offense of the Bribery Count.

The primary witness against Petitioner at trial was Nagy Khairallah, a convicted perjurer who served as a full-time information for the Drug Enforcement Agency ("DEA") from 1983 through 1991 before DEA blacklisted him following his perjury conviction. Khairallah claimed that, between 1992 and 1994, Petitioner issued less than 20 "advance parole"

documents, known as INS Form I-512s ("the Parole Documents"), to Khairallah's clients despite knowing that the underlying application forms contained false information. Khairallah also claimed that he gave Petitioner several gifts, *i.e.*, a television set, a cellular phone, a set of tires, a briefcase, and other items of similar value ("the Alleged Gifts").

With two exceptions, the prosecution did not produce any of the Parole Documents that Petitioner allegedly issued, did not corroborate Khairallah's claim that the underlying applications were false, and did not link any specific Parole Document to any specific Alleged Gift. The two exceptions concerned two Parole Documents that Petitioner allegedly issued to two Iraqi nationals in May 1994. Khiarallah claimed that, in exchange for those two Parole Documents, he purchased roofing materials for Petitioner's home for approximately $5,300.

Unlike the other Parole Documents, the prosecution introduced the two Parole Documents for the Iraqi nationals, and presented extensive testimony from the INS officials who delayed those individuals upon their arrival at Newark Airport on June 26, 1994 and who ultimately paroled them into the country. The prosecution vigorously challenged the legality of that parole decision, arguing that it enabled the two Iraqi nationals to "enter" the United States illegally, and attempted to prove that Petitioner called the INS supervisor from his home and influenced the decision. However, the INS supervisor, testifying as a prosecution witness, claimed that he did not recall speaking with Petitioner that day and that he alone decided to parole the two Iraqi nationals into the country.

In addition to that failing, the prosecution presented contradictory evidence as to the legal question of whether the Parole Documents are "entry" documents, *i.e.*, whether the parole decision enabled the two Iraqi nationals to "enter" the country. One prosecution witness testified that he has "always considered" a Parole Document "to be an entry document," but he conceded that the only authority for his belief speaks only of parole, not entry. In contrast, the INS supervisor who made the parole decision testified for the prosecution that parole is "not

an illegal entry, it's a parole status. It's a temporary status." Similarly, the INS' Executive Associate Commissioner for Field Operations testified for the defense that an alien paroled into the country has not entered the country.

Testifying in his own defense, Petitioner denied Khairallah's claims that he issued the Parole Documents to Kharirallah's clients, that he knew that the underlying applications contained false information, or that he received the Alleged Gifts from Khairallah. With respect to the Alleged Gifts, Petitioner denied that Khairallah had any involvement with certain items; stated that he (Petitioner) directly purchased other items that Khairallah helped him select or obtain; and added that he paid Khairallah for other items (including the roofing materials) that Khairallah had purchased for him. No evidence contradicted Petitioner's testimony concerning the Alleged Gifts other than Khairallah's uncorroborated testimony. Indeed, the individual who installed the roofing materials testified that, when he informed Petitioner that Khairallah's check for roofing materials had bounced, Petitioner expressed surprise because he had given Khairallah $5,300 in cash to cover their cost. Moreover, an FBI agent conceded that Khairallah originally lied to him by claiming that the roofing materials had been installed for free, when in reality, Petitioner had paid for their installation.

Khairallah began cooperating with the prosecution against Petitioner in late August 1994 after a similar indictment was returned against him in the District of Massachusetts on August 11, 1994. A few months earlier, in May 1994, the government had covertly recorded Khairallah stating that his co-conspirator was not Petitioner but a former INS official who served as Khairallah's attorney and submitted to the INS the parole applications for the two Iraqi nationals. Indeed, when first confronted with the Massachusetts indictment in mid-August 1994, Khairallah told the government that this former INS official was his co-conspirator. Only later did Khairallah claim that Petitioner was a co-conspirator, and when he did so he falsely told the government that he had given the Alleged

Gifts to Petitioner during the past three months, not the past three years.

Khairallah also testified that he had served as confidential informant for various agencies of the federal government from 1983 through the present. He specifically testified that he worked for the Federal Bureau of Investigation ("the FBI") throughout the three-year period when he allegedly committed the offenses charged with Petitioner. Indeed, he testified that Petitioner had contemporaneous knowledge of his relationship with the FBI, that he caused FBI agents to contact Petitioner on his behalf during that period of time, and that Petitioner asked him to pass along to the FBI information concerning the INS during that period. Petitioner similarly testified that he knew that Khairallah was working with the FBI during the same period of time in which they allegedly committed the offenses charged in the indictment.

On October 20, 1995, at least five weeks after a grand jury had begun investigating Petitioner, agents of the FBI and the Office of the Inspector General ("OIG") interviewed him in his INS office without the benefit of his retained counsel. When Petitioner asked whether he was a target or subject of the grand jury investigation, the agents told him that allegations of wrongdoing had surfaced against him but refused to characterize his status in the investigation. Although they did not videotape or audiotape this interview, the agents later claimed that Petitioner had falsely denied having a telephone number at which he could contact Khairallah and had falsely claimed that he had last spoken to Khairallah one month earlier.

With respect to the first alleged statement, Petitioner testified that he genuinely believed that he did not have a telephone number at which he could contact Khairallah at the time of the interview. Indeed, the prosecution introduced three recorded conversations between Khairallah and Petitioner (on July 15, 1995, September 21, 1995 and February 22, 1996) that suggested that Petitioner lacked such a phone number for Khairallah. The prosecution also introduced evidence establishing that Khairallah had falsely told Petitioner that he was out of the country at the time of the interview when, in

reality, he was in the United States at that time. Although that fact alone rendered the first alleged statement literally true, the prosecution branded it a lie based solely on a phone number for Khairallah's mother in Lebanon found during a search of Petitioner's home in mid-March 1996, five months after the interview.

With respect to the second alleged statement, Petitioner testified that he told the agents that he had spoken last with Khairallah within the past month, not one month earlier. Because the agents failed to record the interview, no evidence corroborated the agents' version of that alleged statement.

C. Proceedings in the Courts Below

1. The United States District Court for the District of New Jersey. The district court had jurisdiction under 18 U.S.C. § 3231. At the close of the Government's case, Petitioner moved for judgments of acquittal on all counts. With respect to the Entry Document Count and the Entry Count, Petitioner argued, *inter alia*, that because the two Iraqi nationals were paroled into the United States, they never entered the United States as a matter of law so as to implicate either 18 U.S.C. § 1546 or 8 U.S.C. § 1324.[1] On April 21, 1997, the District Court denied Petitioner's post-trial motions, sentenced him to concurrent imprisonment terms of 41 months on each of the five counts of convictions, and fined him $20,000. Petitioner began serving

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[1] 18 U.S.C. § 1546 proscribes the knowing use of a fraudulent document "prescribed by statute or regulation for entry into... the United States." 18 U.S.C. § 1546(a). 8 U.S.C. § 1324(a)(1)(A)(iv) proscribes an individual who "encourages or induces an alien to come to, enter or reside in the United States...in violation of the law." 8 U.S.C. § 1324. Because the prosecution presented no evidence suggesting that the two Iraqi nationals intended to "reside in the United States...in violation of the law" and did not argue at trial or present any evidence or legal authority establishing that the two Iraqi nationals had "come to...the United States...in violation of the law", the Entry Count compelled the prosecution to prove that they had entered the country. Indeed, the indictment entitles the Entry Count "Inducing Illegal Entry of U.S. by Aliens", and the prosecution argued exclusively on that Count that the parole of the two Iraqi nationals constituted an entry.

his imprisonment terms on April 30, 1997. The May 1, 1997 order denying the motions is reprinted in the Appendix hereto.

2. The Court of Appeals for Third Circuit. In March 1998, Petitioner appealed to the United States Court of Appeals for the Third Circuit. Petitioner's appeal set forth the following arguments:

> Judgments of acquittal should be entered as to both the Entry Document Count and the Entry Count because Parole Documents are not "entry" documents as a matter of law. Controlling statutory and case law establishes that parole is a process under which the INS may parole aliens into the United States, on a temporary basis and for emergent reasons, without admitting them into the country or affecting their entry status. Hence, the parole of the two Iraqi nationals charged in those counts did not constitute an "entry" and, therefore, did not implicate either 18 U.S.C. § 1546 or 8 U.S.C. § 1324(a)(1)(A)(iv) as a matter of law. Alternatively, those counts should be remanded for a new trial because the District Court unfairly prejudiced Mr. Lonergan's defense by erroneously charging the jury that an alien's parole into the United States could constitute an illegal entry.
>
> The Conspiracy Count should be remanded for a new trial because the legal defectiveness of the Entry Document Count similarly undermines the Conspiracy Count, which charges the Entry Document Count as one of its multiple objects. Controlling case law precludes multi-object conspiracy convictions where one of the objects is legally defective. Alternatively, the Conspiracy Count should be remanded for a new trial because the District

Court unfairly prejudiced Mr. Lonergan's defense by erroneously charging the jury that it should not consider the substantial evidence establishing that his alleged co-conspirator served as a government informant prior to, during and after the alleged conspiracy. Uniform case law precludes conspiracy convictions where the alleged co-conspirator is a government informant.

The Bribery Count should be remanded for a new trial because the taint and spillover effect of the legally defective Entry Document Count and Entry Count unfairly prejudiced Mr. Lonergan's defense. Controlling case law precludes convictions under counts that are intertwined with legally defective counts where, as here, the jury's deliberations under the former might have been influenced by the latter.

A judgment of acquittal should be entered as to the False Statement Count because the "judicial function" exception to 18 U.S.C. § 1001 precludes conviction thereunder. At least one Court of Appeals has applied that exception where, as here, the defendant made the allegedly false statements to government agents who are acting at least partly in furtherance of a grand jury investigation. Alternatively, the False Statement Count should be remanded for a new trial because the evidence established that one of the alleged statements was literally true and/or because the prosecution constructively amended that count by urging the jury to convict Mr. Lonergan based on an uncharged statement.

Finally, Mr. Lonergan's sentence should be reversed because the District Court erroneously enhanced his offense level under U.S.S.G. § 3C1.1 based on his testimony at trial and his conviction under the False Statement

> Count. Controlling case law establishes that the District Court failed to make the requisite findings with respect to his trial testimony, and any reliance on the False Statement Count conviction to enhance his sentence under this guideline provision reflects improper double counting and multiple punishment.

The Third Circuit affirmed the decision of the District Court. The Court discussed Petitioner's arguments pertaining to the Entry Document Count and the Entry Count, but relegated to a footnote the Court's discussion of Petitioner's remaining arguments, "find[ing] the government's brief to be persuasive on [those] points."[2]

With respect to the Entry Document Count and the Entry Count, the Third Circuit found that the parole documents qualified as "entry" documents because it concluded that parole documents fall within the proscription of the Entry Document Count's charging statute – 18 U.S.C. § 1546. In so finding, however, the Court actually disregarded the language of Section 1546 - which imposes a penalty for fraudulent procurement and misuse of "any [immigrant or nonimmigrant] visa, permit, border crossing card, alien registration receipt card, or other *document prescribed by statute or regulation for entry into*...the United States." 18 U.S.C. § 1546(a) (emphasis supplied).

Significantly, the Court acknowledged that "no statute or regulation indicates whether advance parole documents are entry documents," and then ignored the language of Section 1546. Indeed, the Court found itself fit to impose its own text for the will of Congress, and re-framed the issue and re-wrote the statute to be whether advance parole documents (INS Forms I-512) qualify as "documents prescribed for entry into" the United States. (Emphasis in original).

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[2] Space limitations preclude Petitioner from addressing herein his arguments regarding the Conspiracy Count, the Bribery Count, the False Statement Count, and the Sentencing Enhancement. Petitioner does not waive, but respectfully refers this Court to his arguments on those points in his Brief on Appeal to the Third Circuit.

In a bout of circular reasoning, the Court concluded that advance parole documents do in fact qualify as "documents *prescribed by statute or regulation* for entry" under Section 1546, based largely on its interpretation of language which did not appear in any statute or regulation (as expressly required by Section 1546), but which appeared on the face of a single immigration *document*. The Court also ignored overwhelming judicial precedent holding that parole does not constitute an entry or confer legal status. The Court stated that the cases holding that parole does not effect entry should be limited to their context, and sought to infer that such holdings were inapplicable in the context of the present case. Returning to its circular reasoning, and ignoring its earlier admission that "no statute or regulation indicates whether advance parole documents are entry documents," the Court concluded that "given the otherwise broad statutory definition of 'entry'," and "most significantly," the language on the face of the document, the documents at issue qualified as "documents prescribed by statute or regulation for entry" under Section 1546.

REASONS FOR GRANTING THE PETITION

First, the Third Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, to wit: whether under 18 U.S.C. § 1546, an advance parole document is a "document prescribed by statute or regulation for entry into...the United States."

Second, in its analysis of 18 U.S.C. § 1546, the Third Circuit, in fact, answered the question whether advance parole documents are "documents prescribed by statute or regulation for entry into...the United States," when it admitted that "no statute or regulation indicates whether advance parole documents are entry documents," and then departed so far from this legal finding in its circular and ambiguous unpublished opinion, so as to require an exercise of this Court's supervisory power.

Third, the Third Circuit misstated the legislative history concerning 18 U.S.C. § 1546 and a Fifth Circuit decision concerning the statutory proscription of Section 1546, and relied on those errors in rendering its decision.

Last, notwithstanding the foregoing admission and errors by the Third Circuit, which compel judgments of acquittal for Petitioner, the Third Circuit has decided aspects of this important federal question in a way that conflicts with relevant decisions of this Court and other courts of appeals on the same important matters.

I. An Important Federal Question Is At Issue

The issue whether advance parole documents are "document[s] prescribed by statute or regulation for entry" under 18 U.S.C. § 1546 presents an important federal question that should be settled by this Court. Indeed, this Court has previously acknowledged that the statutory proscriptions of Section 1546 presents an important federal question warranting this Court's review, when this Court granted certiorari in *United States v. Campos-Serrano*, 404 U.S. 293 (1971).

In *United States v. Campos-Serrano*, 404 U.S. 293 (1971), this Court ruled upon the issue of whether a counterfeit alien registration card fell within the coverage of 18 U.S.C. §1546. At the time of this Court's review, prior to the statute's amendment in 1986, the section of the statute under inquiry proscribed the counterfeiting or alteration of, or possession, use or receipt of a counterfeited or altered "visa, permit or other document required for entry into the United States." *Id.* at 295 (quoting 18 U.S.C. § 1546.)[3] Holding that "possession of a counterfeit alien registration receipt card is not an act punishable" under Section 1546 because such a card is not a "document required for entry into the United States," this Court

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[3] In 1986 Congress amended Section 1546 by, *inter alia*, substituting the language "border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry" for "...other document required for entry...." *United States v. Osiemi*, 980 F.2d 344,346 (5th Cir. 1993).

affirmed the reversal of a conviction under the statute. *Id.* at 293.

In *United States v. Osiemi*, 980 F.2d 344 (5th Cir. 1993), the Fifth Circuit examine the issue of whether a foreign counterfeit or altered passport was an offense proscribed by 8 U.S.C. § 1546, as amended in 1986, to wit: whether it was a document "prescribed by statute or regulation" for entry into the United States within the meaning of Section 1546. *Id.* at 346. The Court noted that Title 8 U.S.C. § 1181 provided that, with certain exceptions, an immigrant would not be deemed admitted to the United States unless at the time of application he, *inter alia*, presented a valid unexpired passport or other suitable travel document or document of identity and nationality. *Id.* The Court also noted that a regulation issued by the Attorney General provided that (with certain exceptions) arriving nonimmigrants and immigrants were required to present a valid passport. The Fifth Circuit concluded that "a foreign passport is clearly, and typically, one document '*prescribed by statute or regulation for entry*' into the United States. The possession of a counterfeit or altered passport, therefore, is an offense under the plain language of 1546(a)." *Id.* (emphasis supplied).

In the present case, as discussed more fully below, the Third Circuit has in its analysis of Section 1546, *inter alia*, (1) engaged in a radical departure from this Court's rules requiring strict construction of penal statutes and which were applied by this Court in *Campos-Serrano* and by the Fifth Circuit in *Osiemi*, (2) admitted that "no statute or regulation indicates whether advance parole documents are entry documents," (3) disregarded the language and text of Section 1546, (4) re-written Section 1546, (5) misstated the legislative history of Section 1546, (6) misstated, and departed from, the Fifth Circuit's decision in *Osiemi*, and (7) decided aspects of this federal question in a way that conflicts with relevant decisions of this Court and other courts of appeals.

This is a case of great import. Not only because of the impact on Petitioner, but because of the larger consequences of national significance which arise from the Third Circuit's erroneous decision: this case involves resolution of a federal

question and the Third Circuit has decided the question in a way that conflicts with Congress' intent and legislative purpose, and the proper administration of our nation's laws. Accordingly, the Petition should be granted.

II. The Third Circuit Answered The Question Whether Advance Parole Documents Are "Documents Prescribed By Statute Or Regulation For Entry," When It Admitted That "No Statute Or Regulation Indicates Whether Advance Parole Documents Are Entry Documents," And Then Departed So Far From This Legal Finding So As To Require An Exercise Of This Court's Supervisory Power.

A. In Its Analysis Of 18 U.S.C.§ 1546, The Third Circuit Expressly Acknowledged That There Is No Statute Or Regulation Which Indicates That Advance Parole Documents Are Entry Documents.

The Entry Document Count charged Petitioner with violating 18 U.S.C. §§ 1546 and 2 by aiding, abetting and causing "two Iraqi nationals...to use, possess, obtain, and receive documents prescribed by statute and regulation for entry into the United States, that is, INS Form I-512s, knowing those INS Form I-512s to have been procured by means of false claims and statements, and to have been otherwise procured by fraud and unlawfully obtained."

18 U.S.C. § 1546(a), provides, in pertinent part:

> Whoever knowingly... uses, attempts to use, possesses, obtains, accepts, or receives any [immigrant or nonimmigrant] visa, permit, border crossing card, alien registration receipt card, or other document *prescribed by statute or regulation for entry into...the United States*, knowing it to...have been procured by means of any false claim or statement, or to have been

> otherwise procured by fraud or unlawfully obtained; ...[shall be guilty of a crime]. 18 U.S.C. § 1546 (emphasis supplied).

The issue here is whether the parole documents are "document[s] prescribed by statute or regulation for entry into" the United States.

Significantly, in its analysis of 18 U.S.C. § 1546, the Third Circuit expressly acknowledged that advance parole documents do not fall within the proscription of 1546. Indeed, the Third Circuit clearly and unambiguously states: "*No statute or regulation indicates whether advance parole documents are entry documents*." (Emphasis supplied.)

Consequently, if no statute or regulation indicates whether advance parole documents are entry documents, then advance parole documents cannot be documents prescribed by statute or regulation for entry. The inquiry should have ended there.

Moreover, judgment of acquittal should be entered as to the Entry Document Count because the advance parole documents are not "documents prescribed by statute or regulation for entry" so as to implicate the Entry Document Count's charging statute, Section 1546. Additionally, judgment of acquittal should be entered as to the Entry Count, since advance parole documents are not entry documents, and therefore the Iraqi nationals never "entered" the United States pursuant to those documents, as a matter of law.

B. The Third Circuit Disregarded The Language And Text Of 18 U.S.C. § 1546, And In Lieu Thereof, Concocted And Imposed Its Own Language, Text And Construction Of The Statute And Issue, Which Was In Violation Of This Court's Precedents And An Egregious Abuse Of Discretion.

The Third Circuit's admission that "no statute or regulation indicates whether advance parole documents are entry documents" should have ended the inquiry. However, in spite of, and presumably on account of, its express and

unambiguous admission, the Third Circuit opted to abandon and disregard the language and text of 18 U.S.C. 1546. Such action by the Third Circuit is devoid of all rationality and evidences a flagrant disregard of this Court's decisions governing strict construction of penal statutes.

> "It has long been settled that 'penal statutes are to be construed strictly,' *Federal Communications Comm'n v. American Broadcasting Co.*, 347 U.S. 284, 296, and that one 'is not to be subjected to a penalty unless the words of the statute plainly impose it,' *Keppel v. Tiffin Savings Bank*, 197 U.S. 356, 362. '[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.' *United States v. Universal C. I. T. Credit Corp.*, 344 U.S. 218, 221-222." *Campos-Serrano*, 404 U.S. at 297.

As this Court also noted in *Campos-Serrano*, "'[A] statute ought, upon the whole, to be so construed that, if it can be prevented, *no clause, sentence, or word shall be superfluous, void, or insignificant*.' *Market Co. v. Hoffman*, 101 U.S. 112, 115-116." *Id.* at 301, note 14 (emphasis supplied).

The Third Circuit, however, in a boggling departure from this Court's reasoned opinions requiring strict construction of penal statues, has found itself fit to substitute its own will and language for the will and carefully chosen language of Congress. Indeed, after acknowledging that "[s]ection 1546 proscribes the knowing use of a fraudulent document 'prescribed by statute or regulation for entry into...the United States'", the Third Circuit boldly states: "[t]he question here is whether advance parole documents (INS Forms I-512) qualify as 'documents prescribed for entry into' the United States." (Emphasis in original). By omitting and voiding the words "by

statute or regulation" from the phrase "prescribed by statute or regulation for entry", the Third Circuit has effectively re-written the text of Section 1546.

Such statutory *re*-construction is in clear violation of (1) this Court's decisions requiring strict construction of penal statutes, (2) this Court's holding that "no clause, sentence or word shall be...void or insignificant" in a court's exercise of statutory construction, and (3) evidences an egregious abuse of judicial discretion, and therefore, compels an exercise of this Court's supervisory power.

C. The Third Circuit Erroneously Disregarded The Language And Text Of 18 U.S.C. § 1546, In Order To Render A Decision Based On Its Misleading Interpretation Of Language Appearing On A Single Document, Which Was A Violation Of This Court's Precedents And An Egregious Abuse Of Discretion.

The Third Circuit disregarded the language and text of 18 U.S.C. 1546 in order to render a decision based on the text of a single INS *document* (in lieu of a "statute or regulation" as required by Section 1546). Indeed, the Third Circuit stated:

> "No statute or regulation indicates whether advance parole documents are entry documents. However, INS Form I-512 on its face states 'presentation of the original of this document...will authorize an immigration officer at a port of entry in the United States to permit the named bearer...to enter the United States.' "

The Court concluded: "[g]iven most significantly, the fact that the...document itself states that it permits a bearer to 'enter' the United States, we hold that the documents at issue do qualify as 'documents prescribed by statute or regulation for entry" under Section 1546.'" However, the Third Circuit's conclusion was erroneous for several reasons.

First, the Third Circuit's interpretation of the language on the document was misleading because the document does not state that it permits the bearer to enter, nor does the *document itself* permit the bearer to enter. It states only that it *authorizes an immigration officer* at a port of entry in the United States *to permit the bearer to enter*.

Second, the Third Circuit's interpretation of the language on the document was also misleading, because the Court again omitted critical text from the object of their inquiry. The particular I-512 document entered into evidence in this case stated:

> "Presentation of the original of this document prior to (exp. date) will authorize an immigration officer at a port of entry in the United States to permit the named bearer whose photograph appears hereon, to enter the United States:
>
> ☐ *as an alien paroled pursuant to section 212(d)(5)* of the [I.N.A.]" (Emphasis supplied).

The box beside the statement was checked on the document thereby showing that if permitted to "enter" it was as an alien *paroled* pursuant to section 212(d)(5).

Third, the application for an Advance Parole Document Form I-131 (Rev. 12/10/91) clearly indicates that the document is not an entry document. Form I-131 contains the following statement:

> "An advance parole document is issued *solely to authorize the temporary parole* of an individual into the United States. It may be accepted by a transportation company in lieu of a visa as authorization for the holder to travel to the United States. It is not issued to serve in lieu of any required passport." (Emphasis supplied).

Indeed, the plain language of Form I-131 does not contain any language which indicates that it is an entry document but rather, states clearly to the contrary that it is a document issued "*solely* to authorize the temporary parole of an individual into the United States."

Fourth, the Third Circuit's conclusion is clearly erroneous because, as set forth herein more fully below, "cases are legion to the effect that parole does not effect entry." *Siu Fung Luk v. Rosenberg*, 409 F.2d 555, 558(9th Cir.) (emphasis supplied), cert. denied, 89 S.Ct. 2151 (1969).

Last, the Third Circuit's reliance on the language of a single document (in lieu of a "statute or regulation" as required by Section 1546) is contrary to this Court's decisions requiring strict construction of penal statutes and judgment that "no clause, sentence, or word shall be...void or insignificant." *Campos-Serrano*, 404 U.S. at 401, note 14 (quoting *Market Co. v. Hoffman*, 101 U.S. 112, 115-116).

III. The Third Circuit Misstated The Legislative History Concerning 18 U.S.C. § 1546 And A Fifth Circuit Decision Concerning The Statutory Proscription Of Section 1546.

In support for its holding that advance parole documents "qualify as 'documents prescribed by statute or regulation for entry' under Section 1546", the Third Circuit misstated the legislative intent of the 1986 amendment to Section 1546 and a pertinent decision of the Fifth Circuit.

The Third Circuit states:

> "[Our] reading of the statute is consistent with the apparent intent of the 1986 amendment to Section 1546, which substituted the language '***document prescribed for entry***' for the more narrow reference to documents 'required' for entry. As the Fifth Circuit recognized,

> 'Congress expanded the proscription of the statute.' *United States v. Osiemi*, 980 F.2d 344, 346 (5th Cir. 1993) (holding that foreign passports are *documents prescribed for entry*.)" (Emphasis supplied).

The Third Circuit, however, misstates both the legislative history of Section 1546 and the Fifth Circuit's decision in *Osiemi*.

First, in the 1986 amendment to Section 1546, Congress did not, as the Third Circuit alleges, replace the phrase "other document required for entry" with the language "prescribed for entry." Rather, Congress substituted the language "border crossing card, alien registration receipt card, or other document *prescribed by statute or regulation* for entry..." for "other document required for entry..." (Emphasis supplied.) Not only does the language of the 1986 amendment evidence a Third Circuit that is sorely mistaken, but Congress' decision not to include parole documents in its amendment also evidences Congress' precise intent to *exclude* parole documents from the statute's proscription.

Second, the Third Circuit errs in stating that the Fifth Circuit in *Osiemi* held "that foreign passports are documents prescribed for entry." In that case, the issue was whether possession of a counterfeit or altered foreign passport was an offense proscribed by Section 1546(a). *Osiemi*, 980 F. 2d at 346. The Fifth Circuit Court noted that Title 8 U.S.C. § 1181 provided that, with certain exceptions, an immigrant would not be deemed admitted to the U.S. unless at the time of application he, *inter alia*, presented a valid unexpired passport or other similar identity or nationality document. *Id*. Additionally, the Fifth Circuit noted that a regulation issued by the Attorney General provided that (with certain exceptions) arriving nonimmigrants and immigrants were required to present a valid passport. *Id*.

The Fifth Circuit summarized its findings: "Foreign passports are among that class of documents *prescribed both by statute and regulation*, for presentation both by immigrants and

by non-immigrant aliens, for them to enter the United States." *Id.* at 347. Thus, the Fifth Circuit correctly concluded:

> "[A] foreign passport is clearly, and typically, one document '*prescribed by statute or regulation for entry*' into the United States. The possession of a counterfeit or altered foreign passport, therefore, is an offense under the plain language of 1546(a)." *Id.* at 346. (Emphasis supplied.)

Consequently, the Third Circuit's interpretation of the legislative history of Section 1546 and the Fifth Circuit's decision in *Osiemi* is clearly erroneous. In view of the foregoing, and the fact that the Third Circuit relied on its erroneous interpretations to support its decision, Petitioner respectfully submits that the petition for writ of certiorari should be granted.

IV. The Third Circuit's Decision Conflicts With Statutory Law And Precedent Decisions Which Hold that Parole Does Not Constitute Nor Effect An "Entry."

A. The Third Circuit's Conclusion That The 8 U.S.C. § 1101(a)(13) Definition Of "Entry" Confirms That Advance Parole Documents Are "Documents Prescribed By Statute Or Regulation For Entry," Conflicts With Statutory Law And Precedent Decisions Which Establish That Parole Does Not Effect Entry.

The Third Circuit concludes:

> "Given the otherwise broad statutory definition of 'entry,' and most significantly the fact that the advance parole document itself states that it permits a bearer to 'enter' the United States, we hold that the documents at issue do qualify as

> 'documents prescribed by statute or regulation for entry' under Section 1546."

However, the Third Circuit's conclusion conflicts with statutory law and precedent decisions which establish that parole does not effect entry.

In pertinent part, the term "entry" is statutorily defined to include "any coming of an alien into the United States, from a foreign port or place or from an outlying possession." 8 U.S.C. § 1101(a)(13).[4] However, the federal courts (including the Third Circuit) have substantially narrowed that statutory definition by holding that an "entry" requires "the following three elements: '(1) a crossing into the territorial limits of the United States, *i.e.*, physical presence; (2)(a) inspection and admission by an immigration officer, or (b) actual and intentional evasion of inspection at the nearest entry point; and (3) freedom from official restraint.'" Yang v. Maugans, 68 F.3d 1540, 1545 (3rd Cir. 1995) (citation omitted) (describing those elements as "well-established law").[5]

Put simply, parole is a process under which INS may parole aliens into the United States, on a temporary basis and for emergent reasons, without admitting them into the country or effecting their entry status. The statutory basis under which INS may parole aliens provides as follows:

> The Attorney General may, except as provided in subparagraph (B) or in section 1184(f) of this

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[4] This was the statutory definition at the time of the events at issue. Section 1101(a)(13) was subsequently amended in September 1996, and that amendment is discussed more fully below in the within petition.

[5] In Yang, the Third Circuit addressed "whether an 'entry' may be effected...merely by encroaching upon the United States territorial waters without being detected or pursued by authorities." Id. at 1543. Answering that question negatively, the Court reversed the District Court's judgment and reinstated the judgment of the Board of Immigration Appeals ("the BIA") by adopting the BIA's three-prong definition of the term "entry." Id. at 1545.

> title, in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit or for reasons deemed strictly in the public interest any alien applying for admission to the United States, *but such parole of such alien shall not be regarded as an admission of the alien* and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith *return or be returned to the custody from which he was paroled* and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

8 U.S.C. § 1182(d)(5)(A) (emphasis supplied). Because that section prescribes that aliens paroled into the United States are neither admitted into the country nor free from official restraint, parole does not effect an entry. Indeed, "cases are legion to the effect that parole does not effect entry." *Siu Fung Luk v. Rosenberg*, 409 F.2d 555, 558 (9th Cir.) (emphasis supplied), *cert. denied*, 89 S. Ct. 2151 (1969).[6]

Indeed, in September 1996 Congress effectively codified the "legion" of "cases" by amending the statutory

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[6] As this Court noted in *Leng May Ma v.Barber*, 357 U.S. 185 (1958), parole has been explicitly equated with detention. *Id.* at 189. Additionally, "[this Court] has consistently rejected claims that parole...of an excludable alien had any effect on his status under the law." *Jean v. Nelson*, 727 F.2d 957, 959 (9th Cir. 1984) (citing *Leng May Ma* at 1075 ("The parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted. It was never intended to affect an alien's status."); *Shaughnessy v. United States ex rel. Mezei*, 73 S. Ct. 625, 631 (1953); *Kaplan v. Tod*, 45 S. Ct. 257, 257-258 (1925); and *United States v. Ju Toy*, 25 S. Ct. 644, 646 (1905)).

definition of "entry" to include the following two subparagraphs:

> (A) The terms "*admission*" and admitted mean, with respect to an alien, the lawful *entry* of the alien into the United States after inspection and authorization by an immigration officer.
>
> (B) An alien who is *paroled* under section 1182(d)(5) of this title or permitted to land temporarily as an alien crewman *shall not be considered to have been admitted*.

8 U.S.C. § 1101(a)(13) (as amended Sept. 30, 1996) (emphasis supplied). By equating the term "admission" with the term "entry", Congress unambiguously embraced overwhelming judicial precedent establishing that aliens paroled into the United States have not entered the United States. Indeed, under the clear language of the statute, a parolee is deemed not to have been admitted to the United States and therefore not to have made an entry.

That controlling statutory and case law fatally undermines both the Entry Document Count and the Entry Count as a matter of law. Because aliens paroled into the United States have not entered the United States, the parole documents are not "documents prescribed by statute and regulation for entry into the United States" as charged by the Entry Document Count, and the two Iraqi nationals could not and did not "enter...the United States" as charged in the Entry Count, thus compelling judgments of acquittal on both counts.

United States v. Kavazanjian, 623 F. 2d 730 (1st Cir. 1980), is instructive. In *Kavazanjian*, a jury convicted the defendants under 8 U.S.C. § 1324 of "encouraging or inducing the entry into this country of aliens entitled to enter or reside here." *Id.* at 732. The evidence at trial established that the "aliens arrived at United States airports in the status of 'transits without visa' and then, in most cases, applied for asylum and

were paroled' into this country." *Id.* On appeal, the defendants 'argue[d] that the aliens, by arriving as TWOV's and obtaining parole, never effectuated an 'entry' within the meaning of the statute." *Id.* Finding "substantial merit" in that argument, the First Circuit reversed the convictions by reasoning as follows:

> It is also apparent, as the government appears to concede, that *no entry occurred when the aliens were paroled pending disposition of their asylum requests*. As one court described it, "[C]ases are legion to the effect that parole does not effect entry... ." (Citations omitted.) In part, this result reflects the continued official restraint under which parolees operate. In addition, as the Supreme Court has explained, "The parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted. It was never intended to affect an alien's status... ." (Citation omitted.) The statutory provision authorizing the grant of parole specifically embraces this principal, stating that "such parole of such alien shall not be regarded as an admission of the alien." (Citation omitted.)

Id. at 739. Based on that rationale, the Court concluded that those counts that "relate to aliens who were formally paroled after requesting asylum...fail to state a crime under Section 1324(a)(4) and the convictions must be reversed." *Id.* at 739.

The Third Circuit relies on *United States v. Hanna*, 639 F.2d 194 (5th Cir. 1981) in support of its proposition that parole documents are proscribed by Section 1546. Additionally, in opposing Petitioner's prior motions, the prosecution also relied exclusively on *Hanna* and *United States v. Pierre*, 688 F.2d 724 (11th Cir. 1982). However, both cases are readily distinguishable from *Kavazanjian* and the within case, because those cases involved aliens who were paroled into the United States *after* they had made an illegal entry.

In *Hanna*, the defendant was convicted under section 1324(a)(4) after he "brought [aliens] by boat, clandestinely and at night to the Miami docks." *Hanna*, 639 F.2d at 196. After their illegal entry into the United States, the aliens applied for asylum and received parole pending resolution of their asylum requests. *Id.* The defendant invoked *Kavazanjian* to argue that the aliens' post-entry parole vitiated their illegal entry. *Id.* In rejecting that argument, the Fifth Circuit expressed doubt that *Kavazanjian* was correctly decided, but added that even if it was, the circumstances in *Hanna* were readily distinguishable from the facts in *Kavazanjian*. *Id.* at 195-196. Thus, the Fifth Circuit, distinguishing *Kavazanjian*, "held that a subsequent grant of parole to the aliens to whom defendant is charged with transporting illegally into the country does not erase the original, lawful 'entry.' " *Pierre*, 688 F.2d at 726. In *Pierre*, the Eleventh Circuit adopted that holding in concluding that the defendant was not entitled to a jury instruction that "sought to define 'entry' as used in 8 U.S.C. § 1324(a)(1) so as not to include an alien's illegal entry followed by a grant of parole." *Id.* at 725.

Clearly, the Third Circuit's conclusion that the 8 U.S.C. § 1101(a) definition of "entry" confirms that advance parole documents qualify as "documents prescribed by statute or regulation for entry," conflicts with: (1) decisions of the federal courts, including the Third Circuit's own decision in *Yang*, which substantially narrowed the statutory definition of "entry"; (2) the clear language of 8 U.S.C. § 1182(d)(5)(A) which prescribes that aliens paroled into the United States are neither admitted into the country nor free from official restraint; (3) the "legion" of "cases" which hold that "parole does not effect entry"; (4) the 1996 amendment to Section 1101(a)(13), which provides that parolees are deemed not to have been admitted to the United States, and therefore not to have made an entry; and (5) the First Circuit's decision in *Kavazanjian*, which held that aliens paroled into the U.S. never effectuated an "entry" and reversed convictions under 8 U.S.C. § 1324.

Indeed, the Third Circuit's rationale is a colossal departure from statutory law and precedent decisions which

establish that parole does not effect entry, and therefore, requires an exercise of this Court's review, and judgments of acquittal on the Entry Document Count and Entry Count, because the parole of the two Iraqi nationals charged in those counts did not constitute an "entry" and, therefore, did not implicate either 18 U.S.C. § 1546 or 8 U.S.C. § 1324(a)(1)(A)(iv) as a matter of law.

B. The Third Circuit's Assertion That "Cases Holding That Parole Does Not Effect Entry Should Be Limited to Their Context", Supports Petitioner's Arguments For Judgments of Acquittal.

The Third Circuit states that "cases holding that parole does not effect entry should be limited to their context," and suggests that "the narrow definition of entry" applies to parolees and other aliens only when required to restrict their rights to deportation proceedings.

In support of this argument, the Third Circuit relies on the following passage from the House Report pertaining to the 1996 amendment to Section 1101(a)(13):

> This subsection is intended to replace *certain aspects* of the current "entry doctrine," under which illegal aliens who have entered the United States without inspection gain equities and privileges in immigration proceedings that are not available to aliens who present themselves for inspection at a port of entry. Hence, the pivotal factor in determining an alien's status will be whether or not the alien has been lawfully admitted. *Parolees under INA section 212(d)(5), who are not considered to have made an "entry" under current law, will likewise not be considered to have been admitted under this new definition.*

H.R. Rep. No. 104-469(I) (1996), WL 168955 (emphasis supplied).

The Third Circuit states: "Clearly, Congress approved of the courts' practice of restricting the definition of 'entry' so that parolees did not have a right to deportation proceedings." However, the House Report clearly indicates that the 1996 amendment to the Section 1101(a)(13) was not intended to restrict the rights of parolees, but rather, to restrict the rights of illegal aliens who surreptitiously gained entry into the United States by evading inspection. Moreover, the precise language of the Report actually underscores Congressional approval of established precedent that aliens paroled into the United States have not made an "entry," and shall continue to be so regarded under the new definition.

In an additional failed effort to lend weight to its conclusion that the "narrow definition of entry" need not apply to parolees in any context other than to restrict an alien's rights to deportation proceedings, the Third Circuit proposes that only one court, in *Kavazanjian*, has applied the "narrow definition of entry" in a context other than determining whether an alien is entitled to exclusion or deportation proceedings.

However, in cases which have involved entry-related issues in *criminal* proceedings, the Courts have uniformly applied, or acknowledged the applicability of, the "narrow definition of entry" in the context of criminal proceedings. *United States v. Kavazanjian*, 623 F.2d 730 (1st Cir. 1980) (in criminal proceeding for violation of 8 U.S.C. § 1324(a)(4), First Circuit applied "narrow definition of entry" and reversed conviction of encouraging or inducing entry of aliens not lawfully entitled to enter or reside, holding that aliens who arrived as TWOV's and were paroled into the U.S. never effectuated an "entry"); *United States v. Vasilatos*, 209 F.2d 195 (3rd Cir. 1954) (in criminal proceeding for violation of 8 U.S.C. § 180(a) (predecessor to 8 U.S.C. § 1326), Third Circuit applied "narrow definition of entry" and affirmed conviction of alien who entered the U.S. after being deported in violation of penal statute, holding that alien seaman entered the U.S. when immigration official granted him admission while on board ship and thus alien was free from official restraint, and where case

arose prior to enactment in 1952 of 8 U.S.C. §1101 (a)(13), physical presence was satisfied under law existing at time of offense); *United States v. Cardenas-Alvarez*, 987 F.2d 1129 (5th Cir. 1993) (in criminal proceeding for violation of 8 U.S.C. § 1326, Fifth Circuit affirmed conviction of attempted illegal reentry by alien after deportation, acknowledging applicability of "narrow definition of entry" with respect to crime of actual entry but distinguished crime of actual entry under § 1326, which requires freedom from official restraint, with crime of attempted reentry, which did not impose such requirement otherwise it would make that crime, synonymous with crime of actual entry); *United States v. Hanna*, 639 F.2d 194 (5th Cir. 1981) (in criminal proceeding for violation of 8 U.S.C. § 1324(4), Fifth Circuit discussed the "narrow definition of entry" as applied in *Kavazanjian*, but upheld conviction for encouraging and inducing unlawful entry of aliens where aliens did not arrive in U.S. asserting any status parallel to TWOV as in *Kavazanjian*, but defendant transported 148 aliens by boat, clandestinely, at night to Miami docks, and thereafter, aliens were granted parole); *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989) (in criminal proceeding for violation of 8 U.S.C. § 1324(a)(1), Ninth Circuit applied "narrow definition of entry" but affirmed conviction for bringing in an alien making an illegal entry where there was no evidence that alien was under official restraint during seven months residency in U.S.); *United States v. Oscar*, 496 F.2d 492 (9th Cir. 1974) (in criminal proceeding for violation of 8 U.S.C. § 1325, Ninth Circuit applied "narrow definition of entry" and reversed conviction for aiding and abetting illegal entry of aliens, where aliens physically crossed border to U.S. but were never free from the official restraint of customs officials, and thus never "entered" the U.S.); *United States v. Zayas-Morales*, 685 F.2d 1272 (11th Cir. 1982) (in criminal proceeding for violation of 8 U.S.C. § 1324(a)(1), Eleventh Circuit affirmed dismissal of indictments charging defendants with transporting illegal aliens on the grounds that Government failed to prove requisite criminal intent, but acknowledged that "[c]ase law has expanded the definition of formal entry to include not only the 'coming of an alien into the United States...' but additionally freedom from

restraint. *United States v. Hanna*, 639 F.2d 194,195 (5th Cir. 1981).") *Zayas-Morales*, 685 F.2d at 1275; *United States v. Pierre*, 688 F.2d 724 (11th Cir. 1982) (in criminal proceeding for violation of 8 U.S.C. § 1324(a)(1), Eleventh Circuit applied "narrow definition of entry" to aliens seeking parole pending decision on petition for asylum, but upheld conviction for transporting aliens illegally into the U.S., where aliens were paroled after their illegal entry, since subsequent grant of parole does not erase the original, unlawful entry).

Consequently, the Third Circuit's assertion that "cases holding that parole does not effect entry should be limited to their context" supports Petitioner's arguments for judgments of acquittal. Contrary to the Third Circuit's assertion, the "narrow definition of entry" has not been limited solely in the context of, and for the purpose of, restricting or determining an alien's rights to deportation proceedings, but has been uniformly applied or acknowledged by the Courts in the context of criminal proceedings.

Therefore, statutory law and precedent decisions which hold that parole does not effect entry apply in the context of the present case, and compel judgments of acquittal as to the Entry Document Count and the Entry Count because the parole of the two Iraqi nationals charged in those counts did not constitute an "entry" and, therefore, did not implicate either 18 U.S.C. § 1546 or 8 U.S.C. § 1324(a)(1)(A)(iv) as a matter of law.

Similarly, a judgment of acquittal should be entered as to the Entry Document Count because advance parole documents are not "document[s] prescribed by statute or regulation for entry", so as to implicate the Entry Document Count's charging statute, Section 1546, and a judgment of acquittal should be entered as to the Entry Count, since advance parole documents are not entry documents, and therefore the two Iraqi nationals never "entered" the U.S. pursuant to those documents, as a matter of law.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully submits that the petition for writ of certiorari should be granted.

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-5265

UNITED STATES OF AMERICA

vs.

JOHN F. LONERGAN,
a/k/a
MARK KOURY

John F. Lonergan,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR
THE DISTRICT OF NEW JERSEY

(D.C. No. 96-CR-00424)

District Judge: Honorable Alfred M. Wolin

SUBMITTED AUGUST 3, 1998

BEFORE: Nygaard, Alito, and Rendell,
Circuit Judges.

(Filed NOV 16 1998 , 1998)

MEMORANDUM OPINION OF THE COURT

NYGAARD, Circuit Judge,

Appellant, John F. Lonergan, the former district director for examinations for the United States Immigration and Naturalization Service in the District of New Jersey, appeals his criminal convictions and sentence arising from his role in obtaining fraudulent immigration documents by making misrepresentations to federal investigators. Specifically, between 1992 and 1994 Lonergan procured fraudulent advance parole documents, Forms I-512, for two Iraqi nationals. He raises the issues set out in paragraph I below, taken verbatim from his brief. For the following reasons his convictions and sentence will be affirmed.

I. Issues

1. Whether the District Court erroneously refused to dismiss the Entry Document Count and the Entry Count at the conclusion of the prosecution's case (and after trial) on the ground that Parole Documents are not "entry" documents, and the two Iraqi nationals never "entered" the United States, as a matter of law.

2. Whether the District Court unfairly prejudiced Mr. Lonergan's defense under the Entry Document Count and the Entry Count by erroneously charging the jury that an alien's parole into the United States could constitute an illegal entry.

3. Whether the legal defectiveness of the Entry Document Count precludes conviction under the Conspiracy Count, which charges the Entry Document Count as one of its multiple objects.

4. Whether the District Court unfairly prejudiced Mr. Lonergan's defense under the Conspiracy Count by

erroneously charging the jury that it should not consider the substantial evidence establishing that his alleged co-conspirator served as a government informant prior to, during and after the alleged conspiracy.

5. Whether the taint and spillover effect of the legally defective Entry Document Count and Entry Count unfairly prejudiced Mr. Lonergan's defense of the Bribery Count.

6. Whether the "judicial function" exception to 18 U.S.C. § 1001 precludes conviction under the False Statement Count.

7. Whether the evidence established that one of the two alleged statements under the False Statement Count was literally true.

8. Whether the prosecution constructively amended the False Statement Count by urging the jury to convict Mr. Lonergan based on an uncharged statement.

9. Whether the District Court erroneously enhanced Mr. Lonergan's offense level under U.S.S.G. § 3C 1.1 based on his testimony at trial and his conviction under the False Statement Count.

II. Facts

Lonergan was convicted of five criminal violations: Count One, conspiring to commit various offenses against the United States and to defraud the INS in violation of 18 U.S.C. § 371; Count Two, accepting bribes in violation of 18 U.S.C. § 201(b)(2); Count Four, aiding and abetting two aliens' fraudulent procurement and misuse of INS entry documents in violation of 18 U.S.C. §§ 1546 and 2; Five Count aiding and abetting two aliens' illegal entry into, coming to or residing in the United States in violation of 18 U.S.C. § 1324(a)(1)(A)(iv) and 2; and Count Six, making false statements to federal agents in violation of 18 U.S.C. § 1001. He was acquitted of a related count that charged him with illegally accepting gratuities.

Lonergan raises several challenges to his convictions and penalty, none of which have merit. His issues decoct to

this: that the district court erred by refusing to dismiss the entry document count because advance parole documents are not entry documents.[1] Lonergan argues that he was convicted based upon the legally erroneous conclusion that the advance parole documents he obtained for two Iraqi nationals allow an alien legal entry into the United States. He contends that aliens arriving in the United States with advance parole are permitted temporary presence, but not legal entry into the country. Thus, he argues, Form I-512 is not a "document prescribed by statute or regulation for entry into...the United States" for the purposes of section 1546(a).

II. Discussion

The entry document count charged Lonergan with violating 18 U.S.C. § 1546(a), which provides, in pertinent part, that

> Whoever knowingly...uses, attempts to use, possesses, obtains, accepts, or receives any [immigrant or nonimmigrant] visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained...[shall be guilty of a crime].

18 U.S.C. § 1546(a).

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[1] We have reviewed Lonergan's remaining arguments – regarding the jury charge, the joinder of counts, his conviction for making false statements, his objection to the government's summation, and the enhancement given at sentencing for obstruction of justice – and find the government's brief to be persuasive on these points. We conclude that these contentions are lacking in merit.

Lonergan argues that his conviction under 18 U.S.C. § 1546 should be reversed. Section 1546 proscribes the knowing use of a fraudulent document "prescribed by statute or regulation for entry into...the United States." The question here is whether advance parole documents (INS Forms I-512) qualify as "documents prescribed for entry into" the United States.

No statute or regulation indicates whether advance parole documents are entry documents. However, INS Form I-512 on its face states "presentation of the original of this document...will authorize an immigration officer at a port of entry in the United States to permit the named bearer...to enter the United States." In addition, until the 1996 amendments, the statute broadly defined "entry" as "any coming of an alien into the United States from a foreign port or place or from an outlying possession." 8 U.S.C. § 1101(a)(13) (1964). It seems obvious to us that the aliens used the advance parole document to come into this country from a foreign place.

It has been held, however, in other contexts that an alien paroled into the United States does not "enter" the country. See, e.g., Leng May Ma v. Barber, 357 U.S. 185, 190 (1958). Patel v. McElroy, 143 F.3d 56, 59 (2d Cir. 1998); Siu Fung Luck v. Rosenberg, 409 F.2d 55, 558 (9th Cir. 1969). In these cases, the courts were considered the way in which an alien's status affects his legal rights – specifically his right to deportation proceedings. "[O]nce an alien has 'entered' the United States, that individual has certain rights that can be adjudicated only pursuant to a full deportation hearing. However, if the individual is found in the United States but never 'entered' within the meaning of section 101 of the INA, the alien can be excluded through the summary process of an exclusion hearing." Yang v. Maugans, 68 F.3d 1540, 1543 n.1 (3d Cir. 1995).

In that context, "entry" is a term of art. The reasons for restricting the definition of entry so that parole does not affect an alien's status and rights, however, do not apply to a criminal statute directed at the use of fraudulent documents. In addition, these courts' restrictive interpretation of the term "entry" is in

apparent conflict with the broad statutory definition and its use on INS Form I-512.

In a 1996 amendment to Section 1101(a)(13), Congress deleted the definition of "entry," and replaced it with definitions of "admission" and "admitted," which mean the "lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A). The provision explicitly provides that a paroled alien shall not be considered to have been admitted. 8 U.S.C. § 1101(A)(13)(B). It does not state that a parolee has not "entered" the United States.

The House Report states that:

> [t]his subsection is intended to replace certain aspects of the current "entry doctrine," under which illegal aliens who have entered the United States without inspection gain equities and privileges in immigration proceedings that are not available to aliens who present themselves for inspection at a port of entry. Hence, the pivotal factor in determining an alien's status will be whether or not the alien has been lawfully admitted. Parolees under INA section 212(d)(5), who are not considered to have made an "entry" under current law, will likewise not be considered to have been admitted under this new definition.

H.R. Rep. No. 104-469(I) (1996), 1996 WL 168955. Clearly, Congress approved of the courts' practice of restricting the definition so that parolees did not have a right to deportation proceedings. The change in nomenclature to "admission" and "admitted" suggests, however, that there is some distinction between entry and admission, and that a narrow definition of entry need not apply in other contexts. Significantly, Congress did not amend Section 1546 to restrict it to documents prescribed for "admission." Although this amendment was enacted after the events at issue, it does indicate that the Leng May Ma line of cases may be restricted to their particular legal context.

We conclude that the cases holding that parole does not effect entry should be limited to their context. One court has extended these cases beyond their facts and applied them in its interpretation of 8 U.S.C. § 1324(a)(4), which prohibits any person from inducing or encouraging an alien to enter the United States illegally. See United States v. Kavazanjian, 623 F.2d 730, 736-37 (1st Cir. 1980). Because parole does not effect entry, the court concluded that no crime was stated under Section 1324(a)(4) where aliens were paroled into this country after requesting asylum. See id. at 739.

The Fifth Circuit Court of Appeals has expressly stated that "[w]e doubt that Kavazanjian was correctly decided." United States v. Hanna, 639 F.2d 194, 195 (5th Cir. 1981). Although it found that Kavazanjian was distinguishable, the Hanna court stated that "[i]t would be a misuse of the parole concept to conclude that one who physically transports into the United States persons not otherwise entitled to come cannot be guilty under § 1324(a)(4)." Id. at 196. We conclude that it would likewise be a misuse of the concept of parole to find that the use of fraudulent parole documents at a port of entry to attempt to come into the United States is not prohibited by Section 1546.

This reading of the statute is consistent with the apparent intent of the 1986 amendment to Section 1546, which substituted the language "document prescribed for entry" for the more narrow reference to documents "required" for entry. As the Fifth Circuit recognized, "Congress expanded the proscription of the statute." United States v. Osiemi, 980 F.2d 344, 346 (5th Cir. 1993) (holding that foreign passports are documents prescribed for entry). This case does not, as the government argues, suggest that subsequent to its amendment, Section 1546 applied to all immigration-related documents. It merely confirms that the 1986 amendment broadened the statute's scope. In this case, it is not necessary to find that Section 1546 applies to all immigration-related documents because the document at issue states on its face that it permits an alien to "enter"

Finally, this interpretation does not conflict with the rule requiring strict construction of criminal statutes. In finding that advance parole documents are entry documents, we are applying the plain and ordinary meaning of "entry," as embodied in the version of Section 1101(a)(13) in effect at the time of the conduct at issue. We are merely declining to impose a restrictive judicial gloss on the definition of "entry" that has been applied in other contexts.

III. Conclusion

Given the otherwise broad statutory definition of "entry," and most significantly, the fact that the advance parole document itself states that it permits a bearer to "enter" the United States, we hold that the documents at issue do qualify as "documents prescribed by statute or regulation for entry" under Section 1546. Hence, we will affirm.

TO THE CLERK:

Please file the foregoing opinion.

s/_____
Circuit Judge

JUDGMENT

This cause came to be considered on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit LAR 34.1(a) on August 3, 1998.

On consideration whereof, it is now ordered and adjudged by this court that the judgment of the district court entered April 24, 1997, be and the same is hereby **AFFIRMED**.

ATTEST:

s/_____
Clerk

Date: NOV 16 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-5265

THE UNITED STATES OF AMERICA

v.

JOHN F. LONERGAN,
a/k/a
MARK KOURY

John F. Lonergan,
Appellant

On appeal from the United States
District Court for the District of New Jersey
(D.C. No. 96-CR-00424)
District Judge: Honorable Alfred M. Wolin

SUR PETITION FOR REHEARING

BEFORE: NECKER, Chief Judge,
SLOVITER, STAPLETON, MANSMANN, GREENBERG,
SCIRICA, NYGAARD, ALITO, ROTH, LEWIS, MCKEE and
RENDELL,
Circuit Judges

The petition for rehearing filed by the Appellant in the above-entitled case, having been submitted to the judges who

participated in the decision of the this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court in banc, the petition for rehearing is **DENIED**.

By the Court,

s/_____
United States Circuit Judge

DATED: APR 13 1999

[initials]

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	Hon. Alfred M. Wolin
v.	:	Crim. No. 96-424
JOHN LONERGAN	:	ORDER

This matter having been opened to the Court by defendant John Lonergan (Edward Plaza, Esq., appearing), moving for a judgment of acquittal and a new trial, and Faith S. Hochberg, United States Attorney (Stuart Rabner and Jeffrey Smith, Assistant U.S. Attorneys, appearing), having opposed defendant's motions, and the Court having considered the written submissions and arguments of counsel, and for good cause shown,

IT IS, therefore, on this 1st day May, 1997

ORDERED that defendant's motion for a judgment of acquittal, premised on a claim of insufficient evidence, is denied; and it is further

ORDERED that defendant's motion attacking his conviction on Count 1, premised on a claim that he could not be convicted for conspiring with a government agent, is denied; and it is further

ORDERED that defendant's motions challenging convictions on Counts 2, 4, and 5, premised on claims that insufficient elements of the offenses were satisfied, are denied; and it is further

ORDERED that defendant's motion to dismiss Count 6 is denied; and it is further

ORDERED that defendant's motion for a new trial, pursuant to Rule 33, premised on claims that the government committed a Brady violation and presented perjured testimony, and that the verdict is against the weight of the evidence, is denied.

s/_____
HON. ALFRED M WOLIN
United States District Judge

STATUTES

8 U.S.C. § 1101(a)(13) (1964)

Sec. 1101. Definitions

(a)(13) The term "entry" means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or a foreign place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: *Provided*, That no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception.

8 USC § 1101(a)(13) (as amended Sept. 30, 1996)

Sec. 1101. Definitions

(a) As used in this chapter - ...

(13)(A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

(B) An alien who is paroled under section 1182(d)(5) of this title or permitted to land temporarily as an alien crewman shall not be considered to have been admitted.

(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien -

(i) has abandoned or relinquished that status,

(ii) has been absent from the United States for a continuous period in excess of 180 days,

(iii) has engaged in illegal activity after having departed the United States,

(iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,

(v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or

(vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

8 U.S.C. § 1182(d)(5)

Sec. 1182. Inadmissible aliens

(d) Temporary admission of nonimmigrants

(5)(A) The Attorney General may, except as provided in subparagraph (B) or in section 1184(f) of this title, in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the

alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

(B) The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 1157 of this title.

8 U.S.C. § 1324(a)

Sec. 1324. Bringing in and harboring certain aliens

(a) Criminal penalties

(1)(A) Any person who -

(i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien;

(ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;

(iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law; or

(v)(I) engages in any conspiracy to commit any of the preceding acts, or

(II) aids or abets the commission of any of the preceding acts, shall be punished as provided in subparagraph (B).

18 U.S.C. § 1546

Sec. 1546. Fraud and misuse of visas, permits, and other documents

(a) Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained; or

Whoever, except under direction of the Attorney General or the Commissioner of the Immigration and Naturalization Service, or other proper officer, knowingly possesses any blank permit, or engraves, sells, brings into the United States, or has

in his control or possession any plate in the likeness of a plate designed for the printing of permits, or makes any print, photograph, or impression in the likeness of any immigrant or nonimmigrant visa, permit or other document required for entry into the United States, or has in his possession a distinctive paper which has been adopted by the Attorney General or the Commissioner of the Immigration and Naturalization Service for the printing of such visas, permits, or documents; or

Whoever, when applying for an immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or for admission to the United States personates another, or falsely appears in the name of a deceased individual, or evades or attempts to evade the immigration laws by appearing under an assumed or fictitious name without disclosing his true identity, or sells or otherwise disposes of, or offers to sell or otherwise dispose of, or utters, such visa, permit, or other document, to any person not authorized by law to receive such document; or

Whoever knowingly makes under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact -

Shall be fined under this title or imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)), 20 years (if the offense was committed to facilitate a drug trafficking crime (as defined in section 929(a) of this title)), 10 years (in the case of the first or second such offense, if the offense was not committed to facility such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both.